

INDEX

	Page
Order below	1
Jurisdiction and statement	1
Questions presented	3
Statutes involved	3
The questions are substantial	4
Conclusion	11
Appendix A	12
Appendix B	15
Appendix C	18

CITATIONS

Cases:

<i>Bryan v. United States</i> , 373 F. 2d 403	9
<i>Haynes v. United States</i> , 390 U.S. 85	7
<i>Lambert v. California</i> , 355 U.S. 225	10
<i>Minor v. United States</i> , 396 U.S. 87	4, 5, 6
<i>Morissette v. United States</i> , 342 U.S. 246	9, 10
<i>Sipes v. United States</i> , 321 F. 2d 174, certiorari denied, 375 U.S. 913	9
<i>United States v. Balint</i> , 258 U.S. 250	9-10
<i>United States v. Behrman</i> , 258 U.S. 280	10
<i>United States v. Decker</i> , 292 F. 2d 89, certiorari denied, 368 U.S. 834	9
<i>United States v. Dotterweich</i> , 320 U.S. 277	10
<i>United States v. Fogarty</i> , 344 F. 2d 475	9
<i>United States v. Nardello</i> , 393 U.S. 286	3
<i>United States v. Petrillo</i> , 332 U.S. 1	3
<i>United States v. Spector</i> , 343 U.S. 169	3

Constitution, statutes and regulations:

United States Constitution, Fifth Amendment	4, 8
National Firearms Act Amendments of 1968, 82 Stat. 1227, <i>et seq.</i> , 26 U.S.C. (Supp. IV) 5801, <i>et seq.</i> :	
Sec. 5811(a)	4
Sec. 5812(a)	5

II

Constitution, statutes and regulations—Continued	Page
Sec. 5812 (b)	5, 8
Sec. 5841 (b)	3, 4
Sec. 5841 (c)	2, 3, 4
Sec. 5845	4
Sec. 5848 (a)	5, 7
Sec. 5861 (d)	2, 3, 4, 9
18 U.S.C. 3731	2
26 C.F.R. 179.98-179.100	5
26 C.F.R. 179.99	6
26 C.F.R. 179.202	5, 7
Miscellaneous :	
H. Conf. Rep. No. 1956, 90th Cong., 2d Sess., U.S.C. Cong. & Adm. News 4426, 4435 (1968) ..	8

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. _____

UNITED STATES OF AMERICA, APPELLANT

v.

DONALD FREED AND SHIRLEY JEAN SUTHERLAND

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA*

JURISDICTIONAL STATEMENT

ORDER BELOW

The district court rendered no opinion; its order granting appellee's motion to dismiss the indictment (App. A) is not reported.

JURISDICTION AND STATEMENT

A grand jury in the United States District Court for the Central District of California returned a two-count indictment charging appellees with conspiracy to possess and possession of destructive devices, hand

grenades, in violation of 26 U.S.C. 5861(d) (App. C). Appellees moved to dismiss this indictment. They alleged, *inter alia*, that the applicable provisions "seek to compel defendants to incriminate themselves contrary to the guarantees of the Fifth Amendment to the United States Constitution" and that the indictment violated due process in not alleging as an element of the offense that the possession charged had been with specific knowledge that the firearms had been or would be unregistered. The district court granted appellees' motion on March 10, 1970. It held that the indictment was deficient as a matter of due process for its failure "to allege the requisite element of scienter in connection with such alleged possession, that is, * * * knowledge and intent that the [hand grenades] were unregistered," and that Sections 5861 (d) and 5841(c) unconstitutionally "would compel the accused to furnish to the government * * * information tending to incriminate him or her under the laws of the State of California" (App., *infra*, p. 17).

The United States filed its notice of appeal to this Court in the district court on April 7, 1970 (App. B). By order of June 10, 1970, Mr. Justice Douglas extended the time for filing this jurisdictional statement to and including July 8, 1970. Under 18 U.S.C. 3731, this Court has jurisdiction of a direct appeal from a decision dismissing an indictment based upon a finding of invalidity of the statute upon which the indictment is founded or based upon a construction of the statute.¹ *United States v.*

¹ In this case, the contested construction is that the statute requires as an element of the offense specific knowledge that

Spector, 343 U.S. 169; *United States v. Petrillo*, 332 U.S. 1; *United States v. Nardello*, 393 U.S. 286.

QUESTIONS PRESENTED

1. Whether 26 U.S.C. (Supp. IV) 5861(d), which proscribes the possession by an individual of a firearm not registered to him, impermissibly compels an accused to incriminate himself.

2. Whether 26 U.S.C. (Supp. IV) 5861(d) requires allegation and proof that a transferee of an unregistered firearm knew and intended at the time of transfer that the firearm which he possessed was not registered to himself, and, if not, whether the provision is unconstitutional.

STATUTES INVOLVED

26 U.S.C. (Supp. IV) 5841(b) provides:

By whom registered.

Each manufacturer, importer, and maker shall register each firearm he manufactures, imports, or makes. Each firearm transferred shall be registered to the transferee by the transferor.

26 U.S.C. (Supp. IV) 5841(c) provides:

How registered.

Each manufacturer shall notify the Secretary or his delegate of the manufacture of a firearm in such manner as may by regulations be prescribed and such notification shall effect the registration of the firearm required by this section. Each importer, maker, and transferor of a firearm shall, prior to importing, making, or trans-

a possessed firearm is unregistered; or else that the statute is unconstitutional.

ferring a firearm, obtain authorization in such manner as required by this chapter or regulations issued thereunder to import, make, or transfer the firearms, and such authorization shall effect the registration of the firearm required by this section.

26 U.S.C. (Supp. IV) 5861(d) provides:

It shall be unlawful for any person * * * (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record * * *

* * * *

THE QUESTIONS ARE SUBSTANTIAL

1. The district court's opinion, if affirmed, would render federal control over certain types of dangerous weapons ineffective, and would extend the Fifth Amendment privilege against self-incrimination to circumstances in which this Court has recently held it does not apply. *Minor v. United States*, 396 U.S. 87.

Insofar as relevant here, federal statutes require that a registry be maintained for all firearms, which are defined to include, *inter alia*, destructive devices, such as hand grenades, capable of being concealed on the person. 26 U.S.C. (Supp. IV)² 5845. Before a firearm subject to registration may be transferred, the transferor must register the firearm, 26 U.S.C. 5841(c), identify the prospective transferee, 26 U.S.C. 5841(b), and pay a stated tax—in the case of a hand grenade, \$200. 26 U.S.C. 5811(a). The transfer may

² All provisions cited were enacted as part of the National Firearms Act Amendments of 1968, 82 Stat. 1227, and appear in the current Supplement to the United States Code.

not occur, however, unless the Secretary of the Treasury approves it. 26 U.S.C. 5812(b). The Act specifically provides that the application "shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in violation of law," 26 U.S.C. 5812(a), and that truthful information contained on the application may not be used, "directly or indirectly, as evidence against that person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application * * *." 26 U.S.C. 5848(a). Regulations adopted under the statute elaborate these requirements, but do not change the basic framework set out in the Act. 26 C.F.R. 179.98-179.100, 179.202.

The district court found that "compliance by the accused with * * * 26 U.S.C. § 5841(c), and the regulations promulgated thereunder, would compel the accused to furnish to the government, through its agent, information tending to incriminate him or her under the laws of the State of California, and particularly, California Penal Code Sections 12301 and 182, which make the mere possession and conspiracy to possess destructive devices a felony, whether or not registered with the Secretary of the Treasury" (App., *infra*, pp. 16-17). While the statement is unexplained, the court appears to have considered the transferor the government's agent, and to have felt that the information he would have to obtain from the defendants and submit to the government in connection with an application for permission to transfer would in itself incriminate the defendants of the stated offenses.

Here, as in *Minor, supra*, however, the statute applies to legitimate as well as illegitimate activities, and forbids authorizing a transfer except to a person whose possession would be lawful under state and federal law; any other transfers are flatly forbidden, and any application for such a transfer would be rejected. If a transferee takes possession of a firearm without the requisite approval, he cannot thereafter make his possession legal. Thus, as in *Minor*, the only choice available to the transferee is that which lies before anyone confronted with a statute forbidding a particular act. He may obey or he may flout the law. He cannot obtain federal registration at the risk of disclosing a violation of state law. If his possession would be illegal under state law, he cannot comply with federal law. If his possession would be legal under state law, he would not be incriminating himself by complying with federal law.

While it is true that the regulations involve the potential transferee more deeply in the application process than was the case in *Minor*,³ their effect is undoubtedly to discourage transferees who could never comply with the statute and secure permission for a transfer from ever applying. And to the extent the transferee's participation might be deemed required, but cf. *Minor, supra*, 396 U.S. at 91 n. 3, he falls within the reach of the statutory and regulatory provisions conferring immunity from any use, direct or

³ A transferor must provide, in addition to his transferee's name and address, the transferee's fingerprints and photograph, and a certification by responsible state or federal officials that the transfer is for a lawful purpose. 26 C.F.R. 179.99.

indirect, of the information or evidence required to be submitted in prosecutions for prior or contemporaneous offenses. 26 C.F.R. 179.202; 26 U.S.C. 5848(a).

Thus, even supposing the California offense of conspiracy to possess a destructive device had been complete at the time a federal application for permission to transfer the hand grenades was required, and that the accused were required by the federal statute to submit information in connection with that application, no use, direct or indirect, could have been made of that information in any prosecution of them for the state offense. The state offense of unlawful possession of a destructive device, on the other hand, would not yet be complete. While the statute confers no immunity as to that offense, the information when given is not incriminatory of it—the offense not having been committed. And since anyone applying for federal permission to make the transfer would know at the outset that permission would be granted only if the transfer were lawful under state as well as federal law, it is inconceivable that the application would be made by a person determined to go ahead with the transfer whether or not permission were obtained.

This statutory scheme is thus entirely different from that which this Court held invalid in *Haynes v. United States*, 390 U.S. 85. The registration requirement in that statute was continuing, and this Court viewed it as “directed principally at those persons who have obtained possession of a firearm without complying with the Act’s other requirements, and who therefore are immediately threatened by criminal prosecutions * * *.” *Id.* at 96. It remained possible to comply

with the federal registration provision at all times, but only at the risk of implicating oneself under another state or federal law. This statute was passed to eliminate that fault. H. Conf. Rep. No. 1956, 90th Cong., 2d Sess., 3 U.S.C. Cong. & Adm. News 4426, 4435 (1968). The only point at which it imposes any duty on a transferee is at the point of transfer, and the duty at that point is to refuse to take possession of the firearm unless and until the Secretary has approved the transfer. 26 U.S.C. 5812(b). That duty gives no offense to the Fifth Amendment's privilege against self-incrimination.

2. The district court's conclusion that the indictment was insufficient for failure to allege that the defendants had obtained their alleged possession of unregistered destructive devices "with knowledge and intent that the same were unregistered" is necessarily a construction of the statute to require such a specific intent, and at the same time, a holding that the statute, otherwise construed, would violate due process of law. This narrowing construction is unwarranted, and substantially impedes implementation of the federal scheme; it is sufficient for constitutional and statutory purposes that the government establish (1) that the defendants knew that they were and intended to be in possession of the hand grenades;⁴ and (2) that the hand grenades were in fact unregistered to them.

⁴ As the district court correctly noted at the oral argument on appellees' motion, there was no need to allege in the indictment that the possession itself was knowing and intentional, i.e., that appellees knew they possessed the grenades and intended to do so. (Tr. 6).

The statute itself imposes no specific intent requirement. Section 5861(d) makes it unlawful "for any person to receive or possess a firearm which is not registered * * *" and nothing in its legislative history suggests that the non-registration must be shown to have been known to the recipient or possessor. That the government need not prove a defendant's knowledge as to lack of registration has been held in a number of cases arising under the predecessor to the Act involved here, which on this issue is substantially the same. *Sipes v. United States*, 321 F. 2d 174 (C.A. 8), certiorari denied, 375 U.S. 913; *United States v. Fogarty*, 344 F. 2d 475 (C.A. 6); *Bryan v. United States*, 373 F. 2d 403 (C.A. 5); *United States v. Decker*, 292 F. 2d 89 (C.A. 6), certiorari denied, 368 U.S. 834. Under the statute, a person must know that he is receiving or possessing a firearm; the statute then casts upon him the duty to make certain, before he receives the firearm or takes possession of it, that the person from whom he gets it has authority for the transfer.

There is no constitutional barrier to this scheme. Although specific, guilty knowledge or intent of the type envisioned by the district court is required as to offenses derived from the common law, or *malum in se*, *Morissette v. United States*, 342 U.S. 246, 252, 260 *et seq.*, that requirement may be omitted in the case of criminal statutes with essentially regulatory purposes, "where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes," *United States v.*

Balint, 258 U.S. 250, 252, and “[i]n the interest of the larger good [the statute] puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.” *United States v. Dotterweich*, 320 U.S. 277, 281; *Morissette, supra*, 342 U.S. at 252-260; see also *United States v. Behrman*, 258 U.S. 280. *Balint* involved the sale of opium without an order form; this Court held it a legitimate congressional purpose to “require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him.” 258 U.S. at 254. Here what is at issue is the transfer of firearms. A person can hardly be unaware that firearms are subject to regulation. Where the transferee knows that that is what he is receiving or possesses, it is clearly reasonable to require him to ascertain the authority for the transfer.⁵

⁵ In *Lambert v. California*, 355 U.S. 225, which invalidated on due process grounds a state statute which required registration by all persons who had been convicted of a felony, this Court stressed that the conduct involved was “wholly passive—[a] mere failure to register” (355 U.S. at 228) and “unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed” (*ibid.*). The taking of possession of a grenade is certainly an act of such nature as to alert the recipient that he may be acting contrary to some applicable law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that probable jurisdiction should be noted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
RICHARD L. ROSENFELD,
Attorneys.

JULY 1970

APPENDIX A

HUGH R. MANES

3440 Wilshire Boulevard, Suite 608

Los Angeles, California 90005

Telephone: 385-4361

Attorney for Defendant Freed

LUKE MCKISSACK

6430 Sunset Boulevard, Suite 521

Los Angeles, California 90028

Telephone: 466-7331

Attorney for Defendant Sutherland

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

No. 4846-Cr. (WJF)

UNITED STATES OF AMERICA, PLAINTIFF

vs.

**DONALD FREED, SHIRLEY JEAN SUTHERLAND,
DEFENDANTS**

ORDER OF DISMISSAL OF INDICTMENT

The motion of the above named defendants, Donald Freed and Shirley Jean Sutherland, to dismiss the indictment in the within cause came on for hearing on February 16, 1970, in the United States District Court for the Central District of California, Hon. Warren J. Ferguson, Judge Presiding.

Plaintiff appeared by its attorneys, Wm. Matthew Byrne, Jr., United States Attorney, by Dennis Kinnaid, Assistant United States Attorney.

Defendant Freed appeared by his attorney, Hugh R. Manes, Esq.; defendant Sutherland appeared by her attorney, Luke McKissack, Esq.

The Court, having read and considered the motions, responsive papers and memoranda of law of the respective parties on trial herein, and having heard and considered the oral arguments presented by their respective counsel, and the cause having been submitted for decision, hereby makes the following findings, conclusions and orders, to wit:

One: Count I of the indictment herein, charging defendants with knowing and wilful conspiracy to possess unregistered destructive devices in violation of 26 U.S.C. § 5861(d) offends due process of law by failing to allege the requisite element of scienter in connection with such alleged possession, that is, that defendants knowingly and intentionally conspired to possess destructive devices with knowledge that such devices were or would be unregistered.

Second: Count II of said indictment, charging defendant Freed with possession, and defendant Sutherland with aiding and abetting such possession of unregistered destructive devices likewise violates due process of law by failing to allege the requisite element of scienter in connection with such alleged possession, that is, that defendant Freed possessed, and defendant Sutherland aided and abetted his alleged possession of destructive devices with knowledge and intent that the same were unregistered.

Third: 26 U.S.C. § 5861(d), and 26 U.S.C. § 5841(c), which statutes the indictment accuses defendants of violating, are unconstitutional in that compliance by the accused with the latter statute, 26 U.S.C. § 5841(c), and the regulations promulgated thereunder, would compel the accused to furnish to the government, through its agent, information tending to incriminate him or her under the laws of the State of California, and particularly, California Penal Code

Sections 12301 and 182, which make the mere possession and conspiracy to possess destructive devices a felony, whether or not registered with the Secretary of the Treasury.

For each of the foregoing reasons, therefore:

IT IS HEREBY ORDERED that the Indictment herein, and each count thereof, be and the same hereby are dismissed.

DATED: March 10, 1970

/s/ W. J. Ferguson
Judge of the United States
District Court

April 7, 1970

15

APPENDIX B

WM. MATTHEW BYRNE, JR.
United States Attorney
ROBERT L. BROSI
Assistant United States Attorney
Chief, Criminal Division
DENNIS E. KINNAIRD
Assistant United States Attorney

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012
Telephone: 688-2481

Attorneys for Plaintiff
United States of America

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

No. 4846-CD

UNITED STATES OF AMERICA, PLAINTIFF

v.

**DONALD FREED, SHIRLEY JEAN SUTHERLAND,
DEFENDANTS**

**NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES**

1. Notice is hereby given that the United States of America, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final order dismissing the indictment entered in this action on March 10, 1970.

This appeal is taken pursuant to 18 U.S.C. Section 3731.

2. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

Complaint

Indictment

Notice of Motion to Dismiss Indictment

Opposition to Motion to Dismiss

Reply to Opposition to Motion to Dismiss

Order of Dismissal of Indictment

Transcript of Proceedings on February 16, 1970

Notice of Appeal

3. The following questions are presented by this appeal:

(1) Does Count One of the indictment herein, charging defendants with knowing and wilful conspiracy to possess unregistered destructive devices in violation of 26 U.S.C. § 5861(d) offend due process of law by failing to allege the requisite element of scienter in connection with such alleged possession, that is, that defendants knowingly and intentionally conspired to possess destructive devices with knowledge that such devices were or would be unregistered?

(2) Does Count Two of the said indictment, charging defendant Freed with possession, and defendant Sutherland with aiding and abetting such possession of unregistered destructive devices likewise violate due process of law by failing to allege the requisite element of scienter in connection with such alleged possession, that is, that defendant Freed possessed, and defendant Sutherland aided and abetted his alleged possession of destructive devices with knowledge and intent that the same were unregistered?

(3) Are Sections 5861(d) and 5841(c) of Title 26 unconstitutional in that compliance by the accused

with the latter statute, 26 U.S.C. § 5841(c), and the regulations promulgated thereunder, would compel the accused to furnish to the government, through its agent, information tending to incriminate him or her under the laws of the State of California, and particularly, California Penal Code Sections 12301 and 182, which make the mere possession and conspiracy to possess destructive devices a felony, whether or not registered with the Secretary of the Treasury?

Respectfully submitted,

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant United States Attorney
Chief, Criminal Division

/s/ DENNIS E. KINNAIRD
DENNIS E. KINNAIRD
Assistant United States Attorney
Attorneys for Plaintiff
United States of America

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA
September 1969 Grand Jury

No. 4846 CD

UNITED STATES OF AMERICA, PLAINTIFF

v.

DONALD FREED, SHIRLEY JEAN SUTHERLAND,
DEFENDANTS

INDICTMENT

[18 U.S.C. § 371: Conspiracy; 26 U.S.C. § 5861(d):
Possession of Unregistered Destructive Device;
18 U.S.C. § 2: Aiding and Abetting]

The Grand Jury charges:

COUNT ONE
[18 U.S.C. § 371]

Commencing on or about October 1, 1969, and continuing until the date of the filing of this indictment, in the Central District of California, defendants DONALD FREED and SHIRLEY JEAN SUTHERLAND, wilfully and knowingly combined, conspired, confederated and agreed, together and with each other, and with divers other persons whose names are unknown to the Grand Jury, to commit an offense against the United States, that is, to possess destructive devices, to wit: a number of hand grenades, which hand grenades had not been registered to them with the Secretary of the Treasury or his delegate as required by Section 5841

(c), Title 26, United States Code, in violation of Section 5861(d), Title 26, United States Code.

At the times hereinafter mentioned, the defendants committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. On or about October 1, 1969, in the Central District of California, defendant DONALD FREED held a conversation with an undercover officer of the Los Angeles Police Department at John Brown Bookstore, 13526 1/2 Van Nuys Blvd., Pacoima, California.

2. On or about October 1, 1969, in the Central District of California; defendant DONALD FREED placed a telephone call from a phone booth in Pacoima, California, to the defendant SHIRLEY JEAN SUTHERLAND.

3. On or about October 1, 1969, in the Central District of California, defendant DONALD FREED gave the heretofore mentioned undercover officer of the Los Angeles Police Department a phone number at which defendant DONALD FREED told him to call defendant SHIRLEY JEAN SUTHERLAND.

4. On or about October 1, 1969, in the Central District of California, defendant SHIRLEY JEAN SUTHERLAND held a telephone conversation with the heretofore mentioned undercover officer of the Los Angeles Police Department from a telephone booth in Beverly Hills, California.

5. On or about October 1, 1969, in the Central District of California, defendant SHIRLEY JEAN SUTHERLAND held a second telephone conversation with the heretofore mentioned undercover officer of the Los Angeles Police Department from a phone booth in Beverly Hills, California.

6. On or about October 2, 1969, in the Central District of California, defendant SHIRLEY JEAN SUTHERLAND held a telephone conversation with the hereto-

fore mentioned undercover officer of the Los Angeles Police Department from a telephone booth in Beverly Hills, California.

7. On or about October 2, 1969, in the Central District of California, defendant DONALD FREED held a telephone conversation with the heretofore mentioned undercover officer of the Los Angeles Police Department from his apartment at 1825 Beloit Street, West Los Angeles, California.

8. On or about October 2, 1969, in the Central District of California, defendant SHIRLEY JEAN SUTHERLAND placed and caused to be placed one hundred dollars (\$100) in the mail box at her residence, 1144 Tower Road, Beverly Hills, California, in payment for a number of destructive devices, to wit: hand grenades.

9. On or about October 2, 1969, in the Central District of California, defendant DONALD FREED tendered a one hundred dollar (\$100) check in payment for a number of destructive devices, to wit: hand grenades.

10. On or about October 2, 1969, in the Central District of California, defendant DONALD FREED possessed a number of destructive devices, to wit: hand grenades.

COUNT TWO

[26 U.S.C. § 5861(d), 18 U.S.C. § 2]

On or about October 2, 1969, in the Central District of California, defendant DONALD FREED possessed a number of destructive devices, to wit: hand grenades, which had not been registered to him with the Secretary of the Treasury or his delegate as required by Section 5841(e), Title 26, United States Code.

At said time and place, defendant SHIRLEY JEAN SUTHERLAND aided, abetted, counseled, induced, and procured the commission of the offense alleged above.

A TRUE BILL

Foreman

WM. MATTHEW BYRNE, JR.
United States Attorney